Editor's note: Reconsideration granted; BLM decision affirmed in Order dated Oct. 13, 1988, found at 102 IBLA 8A through F below. (Reconsideration of Oct. 13 order denied Dec. 16, 1988)

HAVASU HEIGHTS RANCH AND DEVELOPMENT CORP.

IBLA 87-485 Decided April 5, 1988

Appeal from a decision of the Arizona State Office, Bureau of Land Management, determining that exchange proposal A-18968 better serves the public interest, and rejecting the exchange proposal submitted by Havasu Heights Ranch and Development Corporation.

Reversed and remanded.

l. Exchanges of Land: Generally--Federal Land Policy and Management Act of 1976: Exchanges--Private Exchanges: Protests

Sec. 207 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. | 1717 (1982), provides that no tract of land may be disposed of under the Act, whether by sale, exchange, or donation, to any person who is not a citizen of the United States, or in the case of a corporation, is not subject to the laws of any state or of the United States. A trustee who is a citizen of the United States is not a proper exchange proponent under sec. 207 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. | 1717 (1982), where all beneficia- ries of the trust are aliens.

2. Exchanges of Land: Generally--Private Exchanges: Public Interest

Sec. 206(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. | 1716(b) (1982), authorizes the Secretary of the Interior to exchange public lands or any interest therein if the public interest will be well served by such exchange.

3. Exchanges of Land: Generally--Private Exchanges: Public Interest

Sec. 206(b) of the Federal Land Policy and Management Act of l976, 43 U.S.C. | l7l6(b) (1982), provides that the values of lands exchanged by the Secretary under the Act shall be equal, or if not equal, shall be equalized by the payment of money to the grantor or to the Secre- tary, as the circumstances require, so long as payment does not exceed 25 percent of the total value of the lands or interests transferred out of Federal ownership.

IBLA 87-485

APPEARANCES: Robert E. Klemm, President, and G. J. Doell, Land Development Coordinator, for Havasu Heights Ranch and Development Corporation, Fort Wayne, Indiana; Edward Z. Fox, Esq., Phoenix, Arizona, for Barton Bell; Fritz L. Goreham, Esq., Office of the Field Solicitor, Phoenix, Arizona, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE KELLY

Havasu Heights Ranch and Development Corporation (Havasu) appeals from a decision of the Arizona State Director, Bureau of Land Management (BLM), dated March 20, 1987, determining that exchange proposal A-18968 better serves the public interest, and rejecting the exchange proposal submitted by Havasu.

Exchange proposal A-18968, as originally submitted, would have involved the conveyance by the United States of 741.30 acres of public land, includ- ing parts of secs. 20 and 32, T. 20 N., R. 21 W., Gila and Salt River Meridian, to Stewart Title & Trust of Phoenix, Inc. (Stewart Title), a Delaware corporation, as trustee of "Trust 2123" for the benefit of individ-uals who are residents of Holland and France, in exchange for 12,393 acres of private lands.

Appellant protested exchange proposal A-18968 because it sought to obtain virtually the identical lands in secs. 20 and 32 as part of an exchange it proposed to BLM on March 11, 1985. By decision dated January 7, 1986, the State Director dismissed appellant's protest, sus- taining notice of realty action (NORA) published at 50 FR 38214 (Sept. 20, 1985). The State Director explained his dismissal of appellant's protest on the basis that the subject lands were being exchanged with another party, i.e., Stewart Title as trustee of Trust 2123, and found that exchange pro- posal A-18968 well served the public interest. Appellant appealed the State Director's decision to the Board, arguing that BLM had wrongly held the subject land to be unavailable for exchange at the time of its proposal.

In Havasu Heights Ranch & Development Corp., 94 IBLA 243 (1986), the Board concluded that "[a]lthough it appears from the protest response that the State Director considered the appropriate standard, i.e., the public interest, in evaluating the protested exchange, the response also reveals that appellants' [1/] proposal did not receive full and fair consideration from BLM." 94 IBLA at 245. The Board surmised from the correspondence that BLM had proceeded upon "the notion that an exchange proposal segre- gates the selected land so as to prevent consideration of a subsequently filed proposal." Id. The Board concluded that 43 CFR 2201.1(b) 2/ "does not suggest that upon the publication of a [Notice of Realty Action] for

1/ In our prior decision, Havasu and G. J. Doell were regarded as separate appellants. Based on the pleadings before us, Havasu is the only appellant in this appeal, with Doell appearing on behalf of Havasu.

2/ Regulation 43 CFR 2201.1(b) provides in relevant part:

"The publication of the notice of realty action on an exchange proposal in the Federal Register may segregate the public lands covered by the notice

an acceptable proposal, BLM may not consider subsequently filed proposals." Id. at 246-47. Rather, "BLM is bound by 43 CFR 2201.1(e) [3/] to consider the merits of such exchange and not simply reject it out of hand." Id. at 247. Accordingly, the Board set aside the State Director's decision, and remanded the case for re-examination of Havasu's proposal and a deter- mination of whether it or exchange proposal A-18969 better serves the public interest. The Board directed the State Director to "issue a decision appealable to this Board setting forth with particularity the reasons for preferring one exchange over the other. If appellants' proposal is again rejected, the State Director's decision shall respond directly to the argu- ments set out in appellants' statement of reasons." Id. at 248.

The State Director's March 20, 1987, decision is now before us on appeal. In this decision, the State Director provided a comparison of the two exchange proposals, and concluded that exchange proposal A-18968 would better serve the public interest. In addition, the State Director addressed several arguments advanced by Havasu in its original statement of reasons as to why BLM improperly approved exchange proposal A-18968. We will now evaluate the conclusions reached by the State Director in his March 20, 1987, decision.

In Havasu Heights Ranch & Development Corp., supra, the Board noted that the appellant argued in its statement of reasons that exchange proposal A-18968 violates section 207 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. | 1717 (1982), which provides that "[n]o tract of land may be disposed of under this Act, whether by sale, exchange, or donation, to any person who is not a citizen of the United States, or in the case of a corporation, is not subject to the laws of any state or of the United States." Appellant's argument, as originally presented to the Board, that the private land proposed for exchange to the United States is
owned by individuals who are not United States citizens, contrary to section 207 of FLPMA, is set forth below:

> The land is in fact owned by individuals who are not United States citizens. Stewart Title & Trust of Phoenix, Inc. acts only as trustee for the owners and does not in fact own the land.

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fn. 2 (continued)
of realty action to the extent that they will not be subject to appropria- tion under the public land laws, including the mining laws. Any subse- quently tendered application, allowance of which is discretionary, shall not be accepted, shall not be considered as filed, and shall be returned to the applicant, if the notice segregates the lands from the use applied for in the application."

3/ Regulation 43 CFR 2201.2(e) provides:

"Where 2 or more exchange proposals are submitted covering the same public lands, in whole or in part, the authorized officer shall review the proposals and advise the exchange proponents as to the acceptance or non- acceptance of their proposals in the same manner as specified in paragraphs (b) through (d) of this section."

> The lands being transferred to the United States were done so at the specific directive and signature of the foreign owner spokesman, Mr. Olindo Iacobelli. This fact was confirmed with Trust Officer, Mr. Merrill E. Lloyd, of Stewart Title & Trust of Phoenix, Inc. in Phoenix, Arizona.
>
> The signature or agreement of either R. Gordon Bell or Barton Bell was not necessary or even a part of the trustee's directive under the terms of the trust agreement.
>
> The fact is that neither R. Gordon Bell or Barton Bell are owners of any percentage of the trust. The transaction is in fact with individuals who are not citizens of the United States, with the Bells acting only as agents if realisticly [sic] acting at all.
>
> Stewart Title & Trust of Phoenix, Inc. is not a corporation holding ownership under the Act but is only a trustee.
>
> If the selected public land is transferred to individuals who are not citizens of the United States, even though a trust is used it would be in direct violation of the intent of the law and the law as stated. [Emphasis in original.]

(Statement of Reasons (SOR), IBLA 86-357, at 2).

In its answer before the Board in Havasu Heights Ranch & Development Corp., supra, BLM acknowledged:

> Presently, the "offered lands" are in trust and some of the beneficial owners are not American citizens and as correctly pointed out by the Protestant, the trust is not a qualified conveyee. BLM is aware of this requirement and the exchange will not be consummated until the necessary steps of transfer are taken to qualify the proponent as a qualified conveyee.

(BLM Answer, IBLA 86-357, at 4).

By Special Warranty Deed dated January 27, 1987, Stewart Title conveyed the private land proposed for exchange to BLM to "Barton W. Bell, a single Man." The deed expressly refers to "Trust 2123 Beneficiaries," all of whom appear from Exhibit A to the deed to be residents of France or Holland.

On January 7, 1987, Olindo Iacobelli, one of the beneficiaries of Trust 2123, executed a "Specific Power of Attorney" appointing Barton W. Bell as
"Attorney-in-Fact" for the "purpose of signing on behalf of Stewart Title Trust No. 2123 for the Beneficiaries." In addition, by letter dated January 27, 1987, to BLM, Iacobelli explained that he and his associates "have had an ongoing business relationship with Gordon Bell Realty AKA Gordon Bell Realty and Development Corp. since December of 1977." In this letter, he stated: "They represent me in all of my real estate dealings in the State of Arizona and have the authority to act on my behalf regarding any real estate matters."

In the March 20, 1987, decision, the State Director addressed Havasu's contention that the owners of record of the private land proposed for exchange are not citizens of the United States. His response is set forth below:

> Title to the private lands offered in exchange proposal A-18968 now vests in Barton Bell according to a preliminary title report now in the possession of the BLM. Mr. Bell is a citizen of the United States. Thus, disposal of the public land to him would not violate section 207 of the Federal Land Policy and Management Act of 1976.

(Decision dated Mar. 20, 1987, at 3).

Appellant argues that

> the true owners of the property [proposed for exchange to BLM] have been the beneficiaries as listed in Stewart Title and Trust #2123; that is: Olindo Iacobelli and all (non-U.S. citizens) and they are still the true owners, even though they are now repre- resented by their Attorney-in-fact Barton Bell who replaces Stewart Title and Trust. [Emphasis in original.]

(SOR, IBLA 87-485, at 2).

In response, Barton Bell asserts that

> [t]he validity of a conveyance of realty is governed exclusively by the laws of the state in which the property is situated. The offered private land in the Bell Exchange is located in the State of Arizona. Pursuant to Arizona Revised Statute | 33-401, a valid conveyance of real property requires "an instrument in writing, subscribed and delivered by the party disposing of the estate or his agent * * * and signed by the grantor * * * duly acknowledged." [Footnotes omitted.]

(Bell Answer, IBLA 87-485, at 6). Bell reasons that the Special Warranty Deed by which he received title to the private land from Stewart Title meets the requirements for effectuating a "valid conveyance of title in Arizona." Id.

[l] Regulation 43 CFR 2200.0-5(b), which implements section 207 of FLPMA, provides as follows:

> "Person" means any person or entity legally capable of conveying and holding land and interests therein, under the laws of the State within which the land or interests therein are located. A person shall be a citizen of the United States, or in the case of

a corporation, shall be subject to the laws of any State or of the United States. [4/]

Taking into account Arizona law on the subject, as contemplated by 43 CFR 2200.0-5(b), we note that prior to 1978, the State of Arizona pro- hibited aliens, who are ineligible for citizenship under the laws of the United States, from acquiring, possessing, enjoying, and transferring real property or any interest therein, except in accordance with "any treaty between the United States and the nation or country of which the alien is a citizen or subject" (Ariz. Rev. Stat. Ann. | 33-1201 (1975). 5/ However,

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4/ On Jan. 6, 1981, BLM amended its exchange regulations to reflect the enactment of FLPMA. 46 FR 1638. In response to BLM's notice of intent to propose the new regulations, which included 43 CFR 2200.0-5(b), BLM received several comments regarding the term "person" as defined in 43 CFR 2200.0-5(b). One comment suggested that a partnership should be specifi-cally included under the term "person," while another requested inclusion of "State." BLM declined to change the definition, stating that "[t]he lan- guage of the proposed rulemaking is broad enough to cover the concerns raised in the comments."

We note that in an Associate Solicitor's opinion, Issuance of Mineral Leases to Partnerships, M-36706 (June 12, 1967), the Associate Solicitor stated that a partnership composed exclusively of United States citizens may hold a lease or permit issued under section 1 of the Mineral Leasing Act, 30 U.S.C. | 181 (1982). That statute provides that leases and permits may be issued "to citizens of the United States, or to associations of such citizens, or to any corporation organized under the laws of the United States, or of any State or Territory thereof."

5/ Ariz. Rev. Stat. Ann. | 33-1204 (1975) provided that "[a] person who as guardian, trustee, attorney in fact or agent, or who in any other capacity has title, custody or control of property or some interest therein belonging to an alien ineligible to citizenship, * * * if the property is of such a character that the alien is inhibited from acquiring, possessing, enjoying or transferring it," shall make annual filings in the office of the secre- tary of state and in the office of the county recorder where the property is located, a written report, showing, inter alia, the property held on behalf of the beneficiary, the date when the property came into his possession, and all expenditures, investments, rents, issues, and profits of the property.

This provision has been interpreted as creating a "rebuttable presump- tion" that a conveyance pursuant to a trust or agency arrangement was "made with intent to prevent, evade or avoid" the effect of section 33-1201, which could result in enforcement of the statutory sanction of escheat under Ariz. Rev. Stat. Ann. || 33-1207(A) and (B) (1975). Lowe, "The Arizona Alien Land Law: Its Meaning and Constitutional Validity," 1976 Ariz. St. L.J. 253, 256 n.14. See Takeuchi v. Schmuck, 276 P. 345 (Cal. 1929), in which the Supreme Court of California ruled that a trust arrangement for the benefit of an alien created a conspiracy to violate California's alien land law.

See generally Morrison, "Limitations on Alien Investment in American Real Estate," 60 Minn. L. Rev. 621 (1980), and Huizinga, "Alien Land Laws: Constitutional Limitations on State Power to Regulate," 32 Hastings L.J.

in 1978, the Arizona legislature repealed its alien land law, removing citizenship as an element of eligibility of owning real property or an interest therein (1978 Arizona Sess. Laws, Ch. 201, | 1). Thus, under current Arizona law, the non-resident alien beneficiaries of Trust 2123 would be eligible to own real property, or any interest therein, in their own right. For purposes of resolution of this appeal, however, there remains the question of whether the citizenship requirement of section 207 of FLPMA has been met.

At common law, "[a] trust in real property for the benefit of an alien is valid where by the laws of the state an alien may take and hold real property. * * * Otherwise, * * * aliens are under the same disabilities as to uses and trusts arising out of real property as they are with respect to the real property itself" (3 C.J.S. Aliens | 26 (1973)). See also Keywan, "Do We Live in Alien Nations," 3 Cal. W. Int. L.J. 73, 83 (1972); Atkins v. Kron, 40 N.C. 207 (1841). In other words, an alien cannot through the use of a trust take and hold real property that he could not take and hold in his own right. We believe this principle is applicable here. In this case, the acceptance of Bell as a qualified proponent of a land exchange will result in all members of the trust obtaining a beneficial interest in real property. Such interest could not be obtained by the beneficiaries in their own right because they do not meet the citizenship requirement of section 207 of FLPMA. It is irrelevant that the State of Arizona has elimi-nated citizenship as an element of eligibility to own real estate. Under the Federal law at issue, citizenship remains an express condition for obtaining Federal land. We therefore conclude that a trustee who is a citizen of the United States is not a proper exchange proponent under section 207 of FLPMA where all beneficiaries of the trust are aliens.

[2] As directed by the Board, the State Director responded to Havasu's contention that exchange proposal A-18968 does not serve the public interest. Section 206(a) of FLPMA, 43 U.S.C. | 1716(a) (1982), provides that the Secretary may dispose of a tract of public land by exchange where he "determines that the public interest will be well served by making that exchange." In his March 20, 1987, decision, the State Director compares exchange proposal A-18968 with Havasu's proposal, and concludes that exchange proposal A-18968 better serves the public interest. The public interest benefits associated with exchange proposal A-18968 derive from its importance to wildlife, range, recreation/wilderness, and cultural programs. We find that the State Director's public interest deter-mination is supported by the record. See National Wildlife Federation, 89 IBLA 271, 277 (1985).

[3] The State Director also responded to Havasu's argument that exchange proposal A-18968 does not reflect an "equal value exchange" under section 206(b) of FLPMA, 43 U.S.C. 1716(b) (1982), which states that "[t]he

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fn. 5 (continued)
251 (1976), both of which articles consider the states' authority to limit investment by aliens in real estate.

values of the lands exchanged by the Secretary under this Act * * * either shall be equal, or if they are not equal, the values shall be equalized by
the payment of money to the grantor or to the Secretary * * * as the cir- cumstances require." The State Director points to 43 CFR 2201.5(c) which provides, as does section 206(b) of FLPMA, for an equalization payment not
to exceed 25 percent of the value of the public lands. He reasons that the difference between $735,000, the appraised value of the private land offered pursuant to proposal A-18968, and $767,000, the appraised value of the pub- lic land, amounts to $32,000, a difference of 4 percent. He states that "[a]n equalization payment will be required prior to issuance of patent to the public land."

We find no error in the State Director's conclusions that (1) exchange proposal A-18968 well serves the public interest under section 206(a) of FLPMA, and that (2) exchange proposal A-18968 reflects an "equal value exchange" as contemplated under section 206(b) of FLPMA. However, we must reverse his decision approving exchange proposal A-18968 on the basis that Bell is not a proper exchange proponent under section 207 of FLPMA. 6/

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the State Director is reversed and this case is remanded for action consistent herewith.

John H. Kelly
Administrative Judge

We concur:

Wm. Philip Horton
Chief Administrative Judge

R. W. Mullen
Administrative Judge

6/ We note that BLM and Barton Bell apparently assumed that the transfer of title to the offered lands from Stewart Title to Bell individually would "qualify the proponent as a qualified conveyee." We disagree. The Special Warranty Deed indicates that Stewart Title is a corporation organized under the laws of Delaware. Under section 207 of FLPMA, public land may be disposed of by exchange to a corporation "subject to the laws of any State or of the United States." Stewart Title, as a corporation subject to the laws of Delaware, would have been no less qualified to effect exchange pro- posal A-18968 than would Bell.

October 18, 1988

IBLA 87-485	:	A-18968
	:	
HAVASU HEIGHTS RANCH AND DEVELOPMENT CORP.	:	Exchange Proposal
	:	
	:	Petitions for Reconsideration
	:	Granted; Decision Affirmed

ORDER

On June 6, 1988, Barton Bell and the Arizona State Director, Bureau of Land Management (BLM), each, through counsel, filed a petition for reconsideration of Havasu Heights Ranch & Development Corp. (Havasu Heights II), 102 IBLA 1 (1988). In Havasu Heights II, the Board reversed a March 20, 1987, decision of the Arizona State Director, BLM, determining that exchange proposal A-18968 better serves the public interest, and rejecting the exchange proposal submitted by Havasu Heights Ranch and Development Corporation (Havasu). While we found that the State Director's public interest determination was supported by the record (102 IBLA at 7), we ruled that exchange proposal A-18968 violated section 207 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1717 (1982), which provides that

> [n]o tract of land may be disposed of under this Act, whether by sale, exchange, or donation, to any person who is not a citizen of the United States, or in the case of corporation, is not subject to the laws of any state or of the United States.

In its statement of reasons filed in Havasu Heights Ranch & Development Corp. (Havasu Heights I), 94 IBLA 243 (1986), Havasu argued as follows:

> The land is in fact owned by individuals who are not United States citizens. Stewart Title & Trust of Phoenix, Inc. acts only as trustee for the owners and does not in fact own the land.
>
> * * * * * * *
>
> The fact is that neither R. Gordon Bell or Barton Bell are owners of any percentage of the trust. The transaction is in fact with individuals who are not citizens of the United States, with the Bells acting only as agents if realisticly [sic] acting at all.
>
> * * * * * * *

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> If the selected public land is transferred to individuals who are not citizens of the United States, even though a trust is used it would be in direct violation of the intent of the law and the law as stated. [Emphasis in original.]

(Statement of Reasons, IBLA 86-357, at 2).

In Havasu Heights I, the Board remanded the case to the Arizona State Director with directions to consider Havasu's arguments, including the argument that exchange proposal A-18968 violates section 207 of FLPMA, when determining whether Havasu's exchange proposal or exchange proposal A-18968 better serves the public interest.

Subsequent to the Board's decision in Havasu Heights I, by Special Warranty Deed dated January 27, 1987, Stewart Title conveyed the private land proposed for exchange to BLM to "Barton W. Bell, a single man." As noted by the Board in Havasu Heights II, this deed expressly refers to "Trust 2123 Beneficiaries," all of whose addresses were listed on Exhibit A as France or Holland. In Havasu Heights II, the Board took note of the following additional facts:

> On January 7, 1987, Olindo Iacobelli, one of the beneficiaries of Trust 2123, executed a "Specific Power of Attorney" appointing Barton W. Bell as "Attorney-in-Fact" for the "purpose of signing on behalf of Stewart Title Trust No. 2123 for the Beneficiaries." In addition, by letter dated January 27, 1987, to BLM, Iacobelli explained that he and his associates "have had an ongoing business relationship with Gordon Bell Realty AKA Gordon Bell Realty and Development Corp. since December of 1977." In this letter, he stated: "They represent me in all of my real estate dealings in the State of Arizona and have the authority to act on my behalf regarding any real estate matters." [Emphasis added.]

102 IBLA at 4.

In Havasu Heights II, the Board applied the common law rule that "aliens are under the same disabilities as to uses and trusts arising out of real property as they are with respect to the real property itself." 102 IBLA at 7, quoting 3 C.J.S. Aliens § 26 (1973). Based upon the facts enumerated above, the Board ruled that "the acceptance of Bell as a qualified proponent of a land exchange will result in all members of the trust obtaining a beneficial interest in real property. Such interest could not be obtained by the beneficiaries in their own right because they do not meet the citizenship requirement of section 207 of FLPMA." 102 IBLA at 7.

In his petition for reconsideration, Bell argues, inter alia, that "the Board simply and wrongly analyzes the above statutory and regulatory provisions as if the prior beneficiaries of Trust 2123 still possess an interest

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in the land" (Petition for Reconsideration at 3). Bell asserts that "the 'Power of Attorney' was executed for the sole purpose of facilitating the conveyance of the exchange property from Trust 2123 to Barton Bell. The land was the only asset in the Trust and once conveyed to Mr. Bell the Trust ceased to have any function or purpose." Id. at 5. Further, Bell states that "Mr. Iacobelli is himself a United States citizen and would himself be a proper exchange proponent." Id. (emphasis in original.) Bell supports these assertions with an affidavit, dated June 1, 1988, in which he states: "In my past relations with Mr. Iacobelli and the past beneficiaries of Trust 2123, I was directed by Mr. Iacobelli to consummate Exchange A-18968 with the Bureau of Land Management ("BLM") and then sell the acquired property." (Emphasis added.)

The Board's conclusion in Havasu Heights II was based upon (1) the "Specific Power of Attorney" appointing Bell as "Attorney-in-Fact" for the "purpose of signing on behalf of Stewart Title Trust No. 2123 for the Beneficiaries," and (2) the Special Warranty Deed by which Stewart Title conveyed to Bell the private land proposed for exchange to BLM. Bell's assertion that "the 'Power of Attorney' was executed for the sole purpose of facilitating the conveyance of the exchange property from Trust 2123 to Barton Bell" appears to be inconsistent with the language of the power of attorney quoted above. Moreover, the deed states that Stewart Title, as "trustee," conveys to Bell the land proposed for exchange to BLM. It appeared to the Board in Havasu Heights II that the deed was intended to substitute Bell for Stewart Title as trustee, and that the beneficiaries of Trust 2123 retained a beneficial interest in any trust property.

In an affidavit submitted in support of his petition for reconsideration, Bell avers that Trust 2123 no longer exists. In its order dated July 27, 1988, the Board stated that this being the case,

> [t]here is, therefore, a likelihood that the previously noted legal impediment to consummation of a valid exchange between Bell and BLM may have been removed, viz., the prospect that the beneficial title to lands to be disposed of by way of exchange would go to persons who are not citizens of the United States. If this is so, the petition for reconsideration is well-taken, and the Board need not revisit the question whether the law forbids aliens from holding any interest in lands that are the subject of an exchange.

(Order dated July 27, 1988, at 3). However, in order to clarify and complete the record in this case prior to ruling on the petitions for reconsideration, the Board requested that "Bell submit further information, if any, that substantiates his assertion that Trust 2123 is no longer in existence." Id.

On August 11, 1988, Bell filed his response to the Board's July 27, 1988, order. In this response, Bell directs the Board's attention to the sworn statement of Donna Oglesby, Vice President of Stewart Title and Trust

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Officer for Trust 2123, who states that "Trust 2123 has ceased to exist as it contains no assets." In addition, Bell submits a letter by Bob Mowls, Assistant Vice President and House Counsel for Stewart Title, who states: "Trust 2123 is now closed and of no further force or effect." Bell reiterates that "Trust 2123 no longer exists," that he "holds fee simple absolute title to the lands offered in Exchange Proposal A-18968," and that he "is a United States citizen and under 207 of FLPMA is a qualified exchange proponent" (Bell's Response to the Board's July 27, 1988, order).

Based upon Bell's submission in response to the Board's request for additional information, the Board concludes that the legal impediment to consummation of a valid exchange between Bell and BLM has been removed, since Bell has established that there are no non-United States citizens who own a beneficial interest in the lands proposed for exchange with BLM.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the petitions for reconsideration are granted and BLM's decision of March 20, 1987, is affirmed.

_____
John H. Kelly
Administrative Judge

I concur:

_____
Wm. Philip Horton
Chief Administrative Judge

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ADMINISTRATIVE JUDGE MULLEN DISSENTING:

As noted by the majority in this order, in Havasu Heights Ranch & Development Corp., 102 IBLA 1 (1988), the Board applied the common law rule that "aliens are under the same disabilities as to uses and trusts arising out of real property as they are with respect to the real property itself." 102 IBLA at 7. I am satisfied that sufficient evidence has been submitted to hold that Trust 2123 has been closed. However, I am not convinced that the parties have not merely substituted a new trust relationship for Trust 2123.

Initially, the trust held the property which was to be exchanged and Barton W. Bell acted on behalf of the trust through a power of attorney. The property was conveyed to Barton W. Bell by an instrument executed by Barton Bell as attorney in fact for the trust. Without evidence to the contrary, it would appear that the conveyance merely "dissolved" Trust 2123 and substituted a constructive trust in its place. The mere fact that Trust 2123 no longer has any assets does not (in my mind, at least) overcome the question of the continued existence of a trust relationship between the record owner of the land and alien beneficiaries. Further inquiry is called for.

R. W. Mullen
Administrative Judge

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